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SYED SAZLEE SYED HAMZAH (AS EXECUTOR OF THE ESTATE OF SYED HAMZAH SYED ABU BAKAR, DECEASED) v. PUNCAK KENANGAN (M) SDN BHD & ORS

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HIGH COURT MALAYA, KUALA LUMPUR
ATAN MUSTAFFA YUSSOF AHMAD J
[CIVIL SUIT NO: WA-22NCC-829-11-2023]
8 JULY 2025

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Abstract – *(i) The court may order security for costs against a non-party who is the driving force behind a litigation, has a significant financial interest in the outcome, and has provided funding in return for a share of the proceeds; (ii) The amount of security for costs should be reasonable and not oppressive. It should be based on an estimated bill of costs and should not stifle a legitimate claim. The court has the discretion to adjust the amount requested to a more appropriate sum.*

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CIVIL PROCEDURE: *Costs – Security for costs – Application for – Dispute relating to shareholding of deceased in company and/or entitlements flowing from such shareholding – Applicants sought security for costs against executor of estate of deceased and one non-party – Whether executor was nominal plaintiff suing on behalf of non-party – Whether non-party had interest in action – Whether non-party driving force behind action – Whether executor had sufficient financial means to pay costs – Whether there was inordinate delay in filing applications for security for costs – Whether security sought excessive, oppressive and misconceived – Whether undertaking as to damages required – Rules of Court 2012, O. 23 r. 1(1) & 1(2A)*

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The plaintiff sued the defendants, in his capacity as the executor of the estate of his late father ('deceased'), who was the shareholder of the first defendant, for dividends allegedly due to the deceased. The claim involved disputes relating to the shareholding of the deceased in the first defendant and/or entitlements flowing from such shareholding. The first, second, third, sixth, seventh and eighth defendants, in encl. 153, and the fourth and fifth defendants, in encl. 155, applied for security for costs, against the plaintiff and/or a non-party, one Khoo Kiam Chong ('KKC'), pursuant to O. 23 r. 1(1) and 1(2A) of the Rules of Court 2012 ('ROC'). The following instruments formed the basis of the defendants' applications: (i) the power of attorney ('POA') executed in 2016 between the deceased, KKC and KKC's son, which gave KKC powers to prosecute actions on behalf of the deceased; (ii) a declaration of trust which indicated that the deceased would hold 47.5% of his interest in the first defendant for KKC; and (iii) an agreement for shares reflecting the deceased's agreement to grant 47.5% of his 50% shareholding in the first defendant to KKC in consideration of KKC's assistance and

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financial services ('instruments'). The dispute prompted extensive litigation and there had also been costs and damages ordered against the plaintiff, in Suit 623, amounting to RM375,041.56 which, to date, remained unpaid. The primary grounds for the application in encl. 153 were: (i) the plaintiff was a nominal plaintiff suing on behalf of KKC; (ii) KKC had financed all the deceased's litigation and was driving this action; (iii) KKC had an interest in this action pursuant to the instruments; and (iv) the plaintiff had insufficient financial means to pay costs if ordered to do so. The grounds for the application in encl. 155 largely mirrored those in encl. 153, with additional grounds that the plaintiff failed to: (i) state his address in the writ and statement of claim; and (ii) comply with costs and damages ordered in Suit 623. Objecting to the defendants' applications, the plaintiff and KKC argued that: (i) the applications ought to be dismissed as there was an inordinate delay since they were filed more than nine months after the filing of the respective defendants' defences. The plaintiff placed reliance on the case of *Jurong Town Corp v. Wishing Star* ('*Jurong Town*') on the issue of delay; (ii) KKC was merely providing assistance based on his long friendship with the deceased and he was not acting as a commercial funder; (iii) the security sought was excessive and oppressive and the applications were misconceived as they sought separate orders against both the plaintiff and KKC; and (iv) the defendants failed to provide an undertaking as to damages, rendering the applications defective.

Held (allowing applications in encls. 153 and 155):

(1) There is no specific timeframe for filing an application for security for costs. The defendants had explained that they waited for the disposal of previous interlocutory applications before filing this application, which was reasonable. The applications had been made at an early stage of the proceedings (when compared with *Jurong Town*), and there was no evidence of prejudice suffered by the plaintiff due to the timing of the applications. (paras 22 & 27)

(2) The plaintiff, as the executor of the deceased's estate, was indeed suing in a representative capacity; the grant of probate confirmed his appointment as executor. Order 23 r. 1(1)(b) of the ROC would not apply directly to him in that capacity. However, the defendants had presented evidence suggesting unusual arrangements through the instruments, which potentially indicated that KKC may be the driving force behind this litigation, with substantial control and significant interest in the outcome. The order against KKC was warranted given his substantial involvement and the financial interest in the outcome of this litigation. (paras 34, 36 & 83)

(3) The evidence, particularly the instruments, strongly indicated that KKC had contributed to the plaintiff's costs in return for a share of the proceeds. While the plaintiff and KKC characterised their arrangement

A as a loan, rather than an investment, the explicit terms of the instruments contradicted this assertion. The documents clearly indicated that KKC was to receive a percentage of recovery in consideration of his assistance and financial services, not merely repayment of a loan. Further, the admission by KKC, in *Sitrac Corporation Sdn Bhd & Anor v. Dato' Syed*
B *Hamzah Syed Abu Bakar (Deceased) & Ors* ('*Sitrac*'), was highly relevant to the present applications; it provided direct evidence of KKC's control over the litigation initiated by the deceased and now continued by the plaintiff as executor. *Sitrac* provided compelling support for the defendants' contention that KKC was not merely providing assistance
C but was, in fact, driving the litigation. (paras 40, 42 & 47)

(4) There was credible evidence to suggest that the plaintiff and/or KKC may be unable to pay costs if ordered to do so. The plaintiff had not adduced any evidence of his financial capability to satisfy a potential costs order. While he correctly argued that his personal occupation was
D not a material consideration as he was suing as executor, the estate's liability to meet a costs order was certainly relevant. The list of assets and liabilities of the deceased's estate indicated that the only confirmed asset was a motor vehicle with an estimated value of RM5,000. The purported values from the shareholding in the first defendant were
E speculative and constituted the very subject matter of this dispute. Furthermore, the fact that KKC and the plaintiff had failed to pay court-ordered costs in previous related litigation strongly suggested they may similarly fail to pay costs in this action if unsuccessful. (paras 59-62)

(5) The first, second, third, sixth, seventh and eighth defendants sought
F security in the sum of RM720,000 and had provided an estimated bill of costs to justify this amount. The court must balance the interest of protecting defendants against the risk of costs going unpaid with the interest of ensuring plaintiffs with legitimate claims can pursue them. Considering all circumstances, including the complexity of the case, the
G number of defendants, the likely duration of trial, the need for expert evidence, the magnitude of the claim and the principle that security should not stifle litigation, a more appropriate amount of security would be RM250,000 rather than the RM720,000 sought. (paras 63 & 68)

(6) The fourth and fifth defendants sought security in the sum of
H RM500,000 but had not provided a detailed bill of costs to justify the amount sought. While a detailed bill of costs is not a strict requirement for an application for security for costs, the absence of such a bill makes it more difficult to assess the reasonableness of the sum sought. A more appropriate amount of security for the fourth and fifth defendants would
I be RM150,000 rather than the RM500,000 sought. (paras 78-81)

(7) There is nothing in the ROC or Malaysian jurisprudence that requires an undertaking as to damages as a prerequisite for an application for security for costs. The non-provision of such an undertaking did not render the applications defective. (para 72)

(8) Order 6 r. 2(e) of the ROC, which requires a plaintiff to state his residence and occupation, applies only if a plaintiff sues in person. As the plaintiff was represented by solicitors, this requirement did not apply. (para 75)

Case(s) referred to:

Amal Bakti Sdn Bhd & Ors v. Milan Auto (M) Sdn Bhd & Ors [2009] 6 CLJ 153 HC ***(refd)***

Arkin v. Borchard Lines Ltd [2005] 1 WLR 3055 ***(refd)***

Customer Loyalty Solutions Sdn Bhd v. Advance Information Marketing Bhd & Anor [2017] CLJU 1894; [2017] 1 LNS 1894 HC ***(refd)***

DB Trustees (Hong Kong) Ltd v. Consult Asia Pte Ltd [2010] SGCA 21 ***(refd)***

Dymocks Franchise Systems (NSW) Pty Ltd v. Todd & Ors [2004] 1 WLR 2807 ***(refd)***

In re RBS Rights Issue Litigation [2017] 1 WLR 4635 ***(refd)***

JSS Tobacco Ltd v. JSS Tobacco London Sdn Bhd & Anor [2023] CLJU 1159; [2023] 1 LNS 1159 HC ***(refd)***

Jurong Town Corp v. Wishing Star [2004] 2 SLR 427 ***(refd)***

Mas Anita Abdullah v. Lew Wai Koung [2013] 3 CLJ 737 HC ***(refd)***

Monkland v. Jack Barclay Limited [1951] 2 KB 252 ***(refd)***

Otech Pakistan Pvt Ltd v. Clough Engineering Ltd [2006] SGCA 46 ***(refd)***

Rainbow v. Kittoe [1916] 1 Ch 313 ***(refd)***

Re Chiew Chiang Seng, Deceased [1982] 2 MLJ 256 ***(refd)***

Re Trepca Mines Ltd (No 2) [1963] Ch 199 ***(refd)***

Rowe & Ors v. Ingenious Media Holdings Plc & Ors [2021] 1 WLR 3189 ***(refd)***

Sitrac Corporation Sdn Bhd & Anor v. Dato' Syed Hamzah Syed Abu Bakar (Deceased) & Ors [2022] 2 CLJ 641 HC ***(refd)***

Theresa Chong v. Kin Khoon & Co [1976] CLJU 165; [1976] 1 LNS 165 FC ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 24(e)

Rules of Court 2012, O. 6 r. 2(e), O. 23 r. 1(1)(b), (c), (2A)(b)

For the plaintiff - Stanley Sinnappen, Dennis Xavier & Haikal Akiemy; M/s Vazeer Akbar Majid & Co

For the 1st, 2nd, 3rd, 6th, 7th & 8th defendants - Jeyakumar Palakrishnar & Normadiah; M/s Zahir Jeya & Zainal

For the 4th & 5th defendants - Terence Chan, Ung Zhee Laine, Jeane Lee Yi Jin & Wong Jing Wen; M/s Lim Kian Leong & Co

Reported by Najib Tamby

JUDGMENT

Atan Mustaffa Yussof Ahmad J:

Introduction

[1] Before the court are the first, second, third, sixth, seventh and eighth defendants' application for security for costs *vide* encl. 153 and the fourth and fifth defendants' application for security for costs *vide* encl. 155. Both applications seek security for costs against the plaintiff and/or a non-party, one Khoo Kiam Chong (NRIC No: 560731-06-5189) ("KKC"), pursuant to O. 23 rr. 1(1) and 1(2A) of the Rules of Court 2012.

A **Background Facts**

[2] The plaintiff is suing in his capacity as the executor of the estate of his late father, Syed Hamzah bin Syed Abu Bakar ("the deceased"), who passed away on 18 July 2021. The deceased was, at the material times, allegedly a shareholder of the first defendant, Puncak Kenangan (M) Sdn Bhd.

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[3] The plaintiff's claim exceeds RM21 million and is essentially for dividends allegedly due to the deceased from the first defendant. The claim involves disputes relating to the shareholding of the deceased in the first defendant and/or entitlements flowing from such shareholding.

C **[4]** There exist three significant documents bearing on this application:

(i) power of attorney dated 19 May 2016 ("POA") executed between the deceased, KKC and KKC's son, Ruben Khoo Sheng Luen;

(ii) declaration of trust dated 13 May 2016 ("declaration of trust"); and

D (iii) agreement for shares dated 26 February 2021 ("agreement for shares").

[5] These documents, collectively referred to as "the instruments", form the basis of the defendants' applications. The POA granted KKC powers to prosecute actions on behalf of the deceased, while the declaration of trust indicated that the deceased would hold 47.5% of his interest in the first E defendant for KKC. The agreement for shares similarly reflected the deceased's agreement to grant 47.5% of his 50% shareholding in the first defendant to KKC in consideration of KKC's assistance and financial services.

F **[6]** The dispute has prompted extensive litigation, including Kuala Lumpur Suit No. WA-22NCC-221-05-2022 ("Suit 221") and Kuala Lumpur Suit No. WA-22NCC-319-07-2022 ("Suit 319"), which are partly heard but have yet to be concluded.

[7] It is also pertinent to note that there have been costs and damages G orders against the plaintiff in a separate proceeding, Kuala Lumpur Suit No. WA-22NCC-623-11-2019 ("Suit 623"), amounting to RM375,041.56, which remain unpaid to date.

The Applications

H *Enclosure 153 – The First, Second, Third, Sixth, Seventh And Eighth Defendants' Application*

[8] By notice of application dated 15 November 2024 filed as encl. 153, the first, second, third, sixth, seventh and eighth defendants seek an order that the plaintiff and/or KKC provide security for costs in the sum of I RM720,000 or any other amount deemed just and reasonable by the court.

[9] The application is supported by an affidavit in support affirmed by Sharifah Shaheera Shahab binti Syed Mustaffa on 15 November 2024 (encl. 154), which annexes, among other documents, the three instruments and an estimated bill of costs.

[10] The primary grounds for the application, as stated in the notice of application and affidavit in support, are:

(i) that the plaintiff is a nominal plaintiff suing on behalf of KKC;

(ii) that KKC had financed all the deceased's litigation and is driving this action;

(iii) that KKC has an interest in this action pursuant to the instruments; and

(iv) that the plaintiff has insufficient financial means to pay costs if ordered to do so.

Enclosure 155 – The Fourth And Fifth Defendants' Application

[11] By notice of application dated 22 November 2024 filed as encl. 155, the fourth and fifth defendants similarly seek an order that the plaintiff and/or KKC provide security for costs in the sum of RM500,000 or any other amount deemed reasonable by the court.

[12] This application is supported by an affidavit in support affirmed by Ngan Ching Woo on 4 December 2024 (encl. 156).

[13] The grounds for this application largely mirror those in encl. 153, with additional grounds that:

(i) the plaintiff failed to state his address in the writ and statement of claim; and

(ii) the plaintiff has failed to comply with costs and damages ordered in Suit 623.

Parties' Submissions

The First, Second, Third, Sixth, Seventh And Eighth Defendants' Submissions

[14] The first, second, third, sixth, seventh and eighth defendants submitted that the plaintiff is a nominal plaintiff suing on behalf of KKC, who has an interest in this action pursuant to the POA, declaration of trust and agreement for shares. They contended that KKC has been driving the litigation under the plaintiff's name and that there is reason to believe the plaintiff will be unable to pay costs if ordered to do so, as evidenced by the unpaid costs from Suit 623. They argued that the sum of RM720,000 is reasonable given the complexity of the case and the claim amount exceeding RM21 million.

[15] The defendants also relied heavily on Justice Liza Chan's judgment in *Sitrac Corporation Sdn Bhd & Anor v. Dato' Syed Hamzah Syed Abu Bakar (Deceased) & Ors* [2022] 2 CLJ 641, arguing that the judgment demonstrated

KKC's control over the litigation. As highlighted in the oral submissions, counsel for the defendants emphasised that Justice Liza Chan found that KKC was "the one giving instructions for the conduct of this matter since commencement including the appointment of solicitors to represent D1" and that KKC had affirmed he was appointed by the deceased to act as his attorney pursuant to the POA.

[16] The defendants further contended that the arrangement between the deceased, the plaintiff, and KKC constituted champerty, which is against public policy and unenforceable under s. 24(e) of the Contracts Act 1950. In support, they cited several authorities including *Theresa Chong v. Kin Khoon & Co* [1976] CLJU 165; [1976] 1 LNS 165; [1976] 2 MLJ 253, *Otech Pakistan Pvt Ltd v. Clough Engineering Ltd* [2006] SGCA 46 (Singapore CA), and *Amal Bakti Sdn Bhd & Ors v. Milan Auto (M) Sdn Bhd & Ors* [2009] 6 CLJ 153; [2009] 5 MLJ 95.

The Fourth And Fifth Defendants' Submissions

[17] The fourth and fifth defendants similarly submitted that the plaintiff is a nominal plaintiff suing for the benefit of KKC, which has exclusive control of this litigation. They highlighted the plaintiff's failure to comply with court orders in Suit 623 and the related appeals judgments. Additionally, they argued that the plaintiff failed to state his address in the writ and statement of claim. They contended that the amount of RM500,000 is reasonable considering the substantial claim amount, the number of defendants, the complexity of the case, and the potential length of trial.

[18] The fourth and fifth defendants also emphasised the distinction between "pure funders" and "commercial funders" as articulated in *In re RBS Rights Issue Litigation* [2017] 1 WLR 4635 (English HC), arguing that KKC falls into the latter category. They cited *Arkin v. Borchard Lines Ltd* [2005] 1 WLR 3055 (English CA) for the proposition that a funder who enters into a champertous agreement will be likely to render himself liable for the opposing party's costs without limit should the claim fail.

The Plaintiff's And Non-Party's Submissions

[19] The plaintiff and KKC maintained that the applications should be dismissed due to delay, and that the plaintiff is not a nominal plaintiff as he is suing in his capacity as executor of the deceased's estate. They argued that KKC merely provides assistance based on its long friendship with the deceased, not acting as a commercial funder. They contended that the security sought is excessive and oppressive, and the applications are misconceived as they seek separate orders against both the plaintiff and KKC. They further argued that the defendants have failed to provide an undertaking as to damages, rendering the applications defective.

[20] The plaintiff argued that the POA ceased to have effect upon the death of the deceased, that the agreement for shares was merely a swap of rights, and that the trust deed was simply a declaration of gift to KKC in appreciation of his assistance. They denied that these arrangements constituted champerty or maintenance.

Analysis And Findings Of The Court

Enclosure 153 – The First, Second, Third, Sixth, Seventh And Eighth Defendants' Application

On The Issue Of Delay

[21] I shall first address the plaintiff's contention regarding delay. The plaintiff stated in para. 34 of his affidavit in reply (encl. 165) that there was an inordinate delay as the applications were filed more than nine months after the filing of the respective defendants' defences with no explanation for this delay.

[22] I find this argument unpersuasive. It is a trite law that there is no specific timeframe for filing an application for security for costs. The defendants explained in para. 15 of their affidavit in reply (encl. 173) that they waited for the disposal of previous interlocutory applications before filing this application, which I find to be reasonable. These previous applications included five striking out applications filed between 19 December 2023 and 9 January 2024 (encls. 10, 11, 12, 14 and 31), which were dismissed by this court on 14 May 2024. The striking out applications were filed by: the fourth and fifth defendants (encl. 10), the first, second, third, sixth, seventh and eighth defendants (encls. 11 and 12), and the ninth defendant (encl. 14), all seeking to strike out the plaintiff's writ of summons and statement of claim on grounds that the action was time-barred and constituted an abuse of process.

[23] Subsequently, three applications for further and better particulars were filed in August 2024 (encls. 122, 123 and 125): Enclosure 122 by the fourth and fifth defendants dated 15 August 2024, encl. 123 by the first, second, third, sixth, seventh and eighth defendants dated 2 August 2024, and encl. 125 by the ninth and tenth defendants dated 13 August 2024, all seeking clarification of various aspects of the statement of claim after the respective defendants had initially requested such particulars by letter in June and July 2024. These were allowed by the court on 9 December 2024.

[24] Furthermore, the first, second, third, sixth, seventh, and eighth defendants stated in para. 6 of their affidavit in support (encl. 154) that this application was necessitated by specific disclosures made during the continued trial of Suit 221 between Puncak Kenangan (M) Sdn Bhd (as first defendant) against Syed Sazlee bin Syed Hamzah (as plaintiff), SSM and Khoo Kiam Chong (as defendants). During the trial proceedings held on 10 September 2024, 11 September 2024, 12 September 2024, 13 September 2024 and 3 October 2024, several admissions were made in evidence:

A (i) the plaintiff admitted under cross-examination that KKC had financed all of the deceased's litigation against the first defendant, which KKC himself confirmed when cross-examined;

(ii) the plaintiff agreed in his testimony that KKC had been driving the suit using the plaintiff's name;

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(iii) the plaintiff was cross-examined regarding payments due from him for assessment of damages ordered by the High Court in what appears to be a related suit (referenced as "Suit 142"), and admitted that the payment remained unpaid and that he was advised by KKC to ignore the court order; and

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(iv) the plaintiff further admitted that there was no arrangement for payment of the assessment of damages and that he only intended to withhold payment while KKC continued to use the power of attorney to carry out the litigation.

D **[25]** These admissions, together with documentary evidence including the instruments (all providing for KKC to receive 47.5% of any recovery), led the defendants to contend that the plaintiff was acting as a nominal plaintiff on behalf of KKC rather than genuinely representing the estate's interests.

E **[26]** As held in *J.S.S. Tobacco Ltd v. J.S.S. Tobacco London Sdn Bhd & Anor* [2023] 1 LNS 1159, defendants are entitled to await the outcome of striking-out applications before filing for security for costs, as there would be no need for such security if the claim were struck out. In that case, involving a UK company plaintiff with no assets within Malaysia, the defendant had applied to strike out the plaintiff's claim on 21 September 2022, which was dismissed

F on 20 January 2023, before filing its security for costs application on 9 March 2023. The court held: "In my view, the first defendant was entitled to await the outcome of the striking-out application before filing the first defendant's application. After all, if the plaintiff's claim were struck out, there would have been no need to apply for security for costs. Thus, the

G calculation of time would have been from 20 January 2023." The calculation of time would therefore begin after the disposal of such applications.

[27] Notably, unlike in *Jurong Town Corp v. Wishing Star* [2004] 2 SLR 427 (Singapore CA) relied upon by the plaintiff on the issue of delay, no trial dates have been fixed in the present case. The plaintiff sought to rely on

H Jurong Town Corp to argue that the delay in making a security for costs application should weigh against granting the application. In that case, JTC awarded WSL (a Hong Kong construction company) a $54m contract for façade works, which JTC subsequently terminated, alleging material misrepresentations in the tender. WSL commenced proceedings on

I 13 January 2003, and trial dates were fixed to commence on 3 November 2003 at a summons for directions hearing on 7 April 2003. However, JTC only applied for security for costs on 6 August 2003, after various interlocutory steps had been taken, including the filing of pleadings, further

particulars, and the discovery of documents. The Singapore Court of Appeal dismissed JTC's appeal and refused security for costs, holding that "two critical factors weigh heavily in favour of WSL. First is the delay in JTC taking out the application. Second, the counterclaim of JTC is based entirely on its defence to the claim of WSL" and noting that "It would be recalled that this action was commenced on 13 January 2003. JTC was obviously not concerned with the fact that WSL is a foreign company when it took various steps in the proceedings, including the filing of pleadings and further particulars and the discovery of documents. The trial was fixed to be heard commencing 3 November 2003 at the summons for directions hearing on 7 April 2003. There was not a squeak then that JTC was concerned about its costs in defending the action." The application has been made at a comparatively early stage of proceedings, and there is no evidence of prejudice suffered by the plaintiff due to the timing of the application.

On Whether The Plaintiff Is A Nominal Plaintiff

[28] The next issue is whether the plaintiff is a nominal plaintiff within the meaning of O. 23 r. 1(1)(b) of the Rules of Court 2012. Order 23 r. 1(1)(b) provides that security for costs may be ordered where "the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so." This provision excludes a plaintiff who is suing in a representative capacity from being ordered to give security for costs.

[29] The plaintiff contends in paras. 12 to 15 of his affidavit in reply (encl. 165) that as executor of the deceased's estate, he is suing in a representative capacity and therefore exempt from the application of O. 23 r. 1(1).

[30] In support, he relies on *Rainbow v. Kittoe* [1916] 1 Ch 313 (English HC). In that case, Rainbow had obtained letters of administration with the will annexed of Esther Pitt (who died in 1851) as the attorney of John W. Cook (who was in Australia) for Cook's own use and benefit and until Cook should apply for and obtain letters of administration. The present action was brought against persons who took under one of the alleged tortfeasors by way of following the estate, with the defendant applying for security for costs on the grounds that Rainbow was without means and was a mere nominee. The court found that although Rainbow "would probably not be able to pay the costs if the action failed," there had been "no deliberate intention on his part or that of his solicitor to select a person who could not pay the costs in case of failure." Sargant J held that "a plaintiff who is an administrator, even although the letters of administration are only granted to him as the attorney of a person who is abroad and until that person obtains letters of administration, and although he is shown to be insolvent, will not be ordered to give security for the defendant's costs of the action."

[31] The defendants, on the other hand, argue that despite the plaintiff's formal status as executor, the circumstances of this case demonstrate that he is in fact a nominal plaintiff suing for the benefit of KKC, particularly given the power of attorney, declaration of trust, and agreement for shares exhibited in the affidavits.

[32] The principle established in *Rainbow v. Kittoe* has been recognised and applied in Malaysian law, as affirmed by our Federal Court in *Re Chiew Chiang Seng, Deceased* [1982] 2 MLJ 256. In that case, the respondent had obtained judgment with costs against the appellants, who were administrators of the estate of Chiew Chiang Seng, deceased. The respondent applied for security for costs under O. 23 r. 1(1)(b) of the Rules of the High Court 1980, arguing that the appellants were merely nominal appellants acting as administrators with no personal interest in the subject matter. The Federal Court held:

> It would therefore appear that the appellants are not nominal plaintiffs. For what a 'nominal plaintiff' is, see pages 393 and 394 of Supreme Court Practice 1979 Pt. I and *Rainbow v. Kittoe* [1916] 1 Ch D 313. In the latter case the plaintiff who was an administrator, even though the letters of administration was only granted to him as the attorney of a person who was abroad and until that person obtained letters of administration, and although he was shown to be insolvent, was not ordered to give security for the defendant's costs.

[33] The rationale behind this rule is sound – an executor or administrator is duty-bound to protect the interests of the estate and all its beneficiaries. This role necessarily entails pursuing claims belonging to the estate, regardless of the executor's personal financial circumstances.

[34] Having carefully considered the authorities and arguments, I find that the plaintiff, Syed Sazlee bin Syed Hamzah, as executor of the deceased's estate, is indeed suing in a representative capacity. The grant of probate exhibited as exh. P64 confirms his appointment as executor. Therefore, O. 23 r. 1(1)(b) would not apply directly to him in that capacity.

[35] However, this finding does not end the inquiry. While the plaintiff is formally an executor, the court must examine whether in substance he is acting purely in that capacity or whether there are special circumstances that might justify a departure from the general rule.

[36] The defendants have presented evidence suggesting unusual arrangements through the POA, declaration of trust, and agreement for shares, which potentially indicate that KKC may be the driving force behind this litigation, with substantial control and a significant interest in the outcome.

[37] Nevertheless, at this interlocutory stage, without having heard full evidence on these documents (which are matters being litigated in related proceedings WA-22NCC-221-05-2022 and WA-22NCC-319-07-2022), it would be premature to reach definitive conclusions about their impact on the plaintiff's status as executor.

[38] This finding on the plaintiff's status, however, does not dispose of the application as there remain other grounds to consider, particularly those relating to the non-party, KKC, under O. 23 r. 1(2A) of the Rules of Court 2012.

On The Application Against KKC As A Non-Party

[39] The crux of the defendants' applications lies in O. 23 r. 1(2A)(b), which provides for security for costs against a non-party who "has contributed or agreed to contribute to the plaintiff's costs in return for a share of any money or property which the plaintiff may recover in the action or proceedings." Order 23 r. 1(2A) provides:

> (2A) Where, on the application of a defendant to an action or other proceedings in the Court, it appears to the Court that:
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> (a) a party, who is not a party to the action or proceedings (which is referred to as a "non-party"), has assigned the right to the claim to the plaintiff with a view to avoid his liability for costs; or
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> (b) the non-party has contributed or agreed to contribute to the plaintiff's costs in return for a share of any money or property which the plaintiff may recover in the action or proceedings, and the non-party is a person against whom a costs order may be made, then, if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the non-party to give such security for the defendant's costs of the action or other proceedings as the Court thinks just.

[40] The evidence before this court, particularly the three instruments (the POA, declaration of trust, and agreement for shares) exhibited in encl. 154, strongly indicates that KKC has contributed to the plaintiff's costs in return for a share of the proceeds.

[41] The declaration of trust dated 13 May 2016 states that in return for KKC's assistance and financial services, he shall receive 47.5% of the deceased's interest in the first defendant. Similarly, the agreement for shares dated 26 February 2021 provides that KKC shall receive 47.5% of the shares which the plaintiff may recover, in consideration of KKC's assistance and financial services.

[42] While the plaintiff and KKC characterise their arrangement as a loan rather than an investment in paras. 17 and 18 of the plaintiff's affidavit in reply (encl. 165), the explicit terms of the instruments contradict this

A assertion. The documents clearly indicate that KKC is to receive a percentage of recovery in consideration of his assistance and financial services, not merely repayment of a loan.

[43] I am persuaded by the authority in *Dymocks Franchise Systems (NSW) Pty Ltd v. Todd & Ors* [2004] 1 WLR 2807 (Privy Council). In that case, B Dymocks (a bookstore franchisor) had entered into franchise agreements with the Todds, who were husband and wife. When the franchise agreements were terminated and litigation ensued, the Todds sought financial assistance from Mrs Todd's family because of the demands of the litigation. Associated Industrial Finance Pty Ltd ("Associated"), a company beneficially owned by C Mrs Todd's family, advanced substantial funds to fund the Todds' appeals to both the New Zealand Court of Appeal and the Privy Council. Associated registered an all moneys debenture over the Todds' company and put it into receivership, with the receivers instructed to pay over funds to the Todds' solicitors for the conduct of the appeals. The Privy Council held:

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> Where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that if the proceedings fail, he will pay the successful party's costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. He himself is 'the real party' to the litigation ...

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[44] This principle was applied in *DB Trustees (Hong Kong) Ltd v. Consult Asia Pte Ltd* [2010] SGCA 21 (Singapore CA), a costs judgment concerning an application for a non-party to be made personally liable for litigation costs where the non-party was found to be closely connected to proceedings F involving commercial disputes and enforcement of security. The Singapore Court of Appeal observed:

> It is sufficient that the non-party either funds or controls legal proceedings with the intention of ultimately deriving a benefit from them.

On The Relevance Of Justice Liza Chan's Judgment

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[45] The defendants have placed considerable reliance on Justice Liza Chan's judgment in *Sitrac Corporation Sdn Bhd & Anor v. Dato' Syed Hamzah Syed Abu Bakar (Deceased) & Ors* (*supra*). The *Sitrac* case concerned a claim by Sitrac Corporation Sdn Bhd and Kelana Jati Sdn Bhd to set aside a prior court order obtained by the first defendant through alleged deception and H concealment in proceedings involving the rectification of company share records, raising issues about the defendant's mental capacity and the legitimacy of instructions given in the earlier litigation. The defendants rely on this judgment as it provides direct evidence of KKC's control over litigation conducted in the deceased's name, demonstrating a pattern of KKC I driving litigation rather than merely providing assistance.

[46] In that case, during trial, it emerged that KKC had been appointed by the deceased to act as his attorney pursuant to the POA. More importantly, KKC had stated in an unsworn affidavit that "he was the one giving instructions for the conduct of this matter since commencement including the appointment of solicitors to represent D1" (para. 18.3 of the judgment).

[47] This admission by KKC, as found by Justice Liza Chan, is highly relevant to the present application. It provides direct evidence of KKC's control over the litigation initiated by the deceased and now continued by the plaintiff as executor. The judgment therefore provides compelling support for the defendants' contention that KKC is not merely providing assistance but is in fact driving the litigation.

[48] While the plaintiff argues that the POA ceased to have effect upon the deceased's death, the practical reality appears to be that KKC continues to exercise substantial control over the present litigation, as he did over the deceased's previous litigation. The judgment therefore remains relevant to the present application, even if the POA itself may no longer be valid.

On The Issue Of Champerty And Maintenance

[49] The defendants have argued that the arrangement between the deceased, the plaintiff, and KKC constitutes champerty, which is contrary to public policy under s. 24(e) of the Contracts Act 1950.

[50] Champerty is defined as an agreement where one party agrees to aid another to bring a claim on the basis that the person who gives the aid shall receive a share of what may be recovered in the action. Maintenance, a broader concept, involves improper support of litigation in which the supporter has no legitimate interest.

[51] In *Theresa Chong v. Kin Khoon & Co* (*supra*), a case involving a dispute over share dealings between a stockbroker and an unregistered remisier who contravened stock exchange by-laws, the Federal Court recognised that contracts may be void as contrary to public policy under s. 24 of the Contracts Act 1950, if they fall into established categories of prohibited contracts, including champerty and maintenance. The court cited with approval of the judgment of Asquith LJ in *Monkland v. Jack Barclay Limited* [1951] 2 KB 252 which states:

> Certain specific classes of contracts have been ruled by authority to be contrary to the policy of the law ... The courts have again and again said that, where a contract does not fit into one or other of these pigeon holes ... the courts should use extreme reserve in holding such a contract to be void as against public policy, and should only do so when the contract is incontestably and on any view inimical to the public interest.

[52] The court also referred to *Cheshire and Fifoot's Law of Contract* (8th edn) which states "it is no longer legitimate for the courts to invent a new head of public policy" and that judges "must be content to apply, either directly or by way of analogy, the principles laid down in previous decisions."

[53] This position was further reinforced in *Otech Pakistan Pvt Ltd v. Clough Engineering Ltd* [2006] SGCA 46, where Clough had engaged Otech to assist in resolving disputes with a Pakistani Government entity regarding two gas plant projects, with Otech to receive a percentage of any settlement amount. The Singapore Court of Appeal held that champerty offends public policy because of its tendency to pervert the course of justice. The court stated:

> The law of champerty stems from public policy considerations that apply to all types of legal disputes and claims, whether the parties have chosen to use the court process to enforce their claims or have resorted to a private dispute resolution system like arbitration ... The concerns that the course of justice should not be perverted and that claims should not be brought on a speculation or for extravagant amounts apply just as much to arbitration as they do to litigation.

[54] The court considered Lord Denning's explanation in *Re Trepca Mines Ltd (No 2)* [1963] Ch 199 (English Court of Appeal), a case concerning litigation funding arrangements where a third party agreed to finance legal proceedings in return for a share of any recovery. The English Court of Appeal had to consider whether the solicitor could recover his fees when he had actively participated in champertous agreements. Lord Denning at 219-220 stated:

> The reason why the common law condemns champerty is because of the abuses to which it may give rise. The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses. These fears may be exaggerated; but, be that so or not, the law for centuries has declared champerty to be unlawful, and we cannot do otherwise than enforce the law ...

[55] More directly relevant to the present case is *Amal Bakti Sdn Bhd & Ors v. Milan Auto (M) Sdn Bhd & Ors* (*supra*), where the court had to decide whether the first plaintiff's acquisition of litigation rights through a deed of assignment for RM1 constituted an unenforceable champertous agreement. The court found that a company had assigned its rights to the first plaintiff for a nominal sum after the underlying commercial venture had failed, with the assignee having no original interest in the subject matter and having suffered no loss. The High Court held that this assignment agreement was champertous and unenforceable contrary to public policy. The court stated:

> In this case the first plaintiff had paid RM1 only with a view of obtaining a larger sum through litigation taking into consideration the first plaintiff is not the original purchaser and has suffered no loss whatsoever. It is trite that court will not entertain champerty agreement or its like on public policy grounds, *etc*. The learned authors of *Chitty on Contracts* (13th Ed) Vol [1] p 1120 make the following observations: ... Champerty has been defined as 'an aggravated form of maintenance' and occurs when the person maintaining another stipulates for a [share] where property is in dispute. For champerty there must not only be interference on the suit but there must be the added factor of a division of the spoils.

[56] While the instruments in the present case are more complex than a simple assignment of rights, they bear many of the hallmarks of a champertous arrangement. The declaration of trust and the agreement for shares both provide that KKC will receive 47.5% of the deceased's interest in consideration of his assistance and financial services, including in the initiation of proceedings.

[57] The case of *Arkin v. Borchard Lines Ltd* (*supra*) is particularly instructive here. In that case, the Court of Appeal was dealing with a funding agreement in the context of commercial litigation where the funder had entered into arrangements that potentially fell afoul of the policy considerations underlying the prohibition against champerty. The Court of Appeal held that: "The approach that we are about to commend will not be appropriate in the case of a funding agreement that falls foul of the policy considerations that render an agreement champertous. A funder who enters into such an agreement will be likely to render himself liable for the opposing party's costs without limit should the claim fail." This principle supports the imposition of security for costs against a non-party funder who has entered into what appears to be a champertous arrangement.

[58] While it is not necessary for me to determine definitively whether the instruments constitute champerty for the purposes of this application, the champertous features of the arrangement provide additional support for ordering security for costs against KKC.

On The Ability To Pay Costs

[59] There is credible evidence to suggest that the plaintiff and/or KKC may be unable to pay costs if ordered to do so. The first, second, third, sixth, seventh, and eighth defendants have argued that the plaintiff has failed to pay the costs and damages ordered in Suit 623 (a prior proceeding where KKC pursued claims relating to an alleged 23% stake in Citra Corporation, which ultimately failed and resulted in costs orders against him) and the related appeals judgments, amounting to RM375,041.56, despite demands. The defendants contend that this failure demonstrates a high likelihood that they may not be able to recover costs if the plaintiff's claim is dismissed unless security is provided.

[60] The plaintiff has not adduced any evidence of his financial capability to satisfy a potential costs order. While he correctly argues in para. 25 of his affidavit in reply (encl. 165) that his personal occupation is not a material consideration as he is suing as executor, the estate's ability to meet a costs order is certainly relevant.

[61] The list of assets and liabilities of the deceased's estate exhibited as "SSS5" in encl. 154 indicates that the only confirmed asset is a motor vehicle with an estimated value of RM5,000. The purported values from shareholding in the first defendant are speculative and constitute the very subject matter of this dispute.

[62] The fact that KKC and the plaintiff have failed to pay court ordered costs in previous related litigation strongly suggests they may similarly fail to pay costs in this action if unsuccessful.

On The Quantum Of Security

[63] The first, second, third, sixth, seventh and eighth defendants have sought security in the sum of RM720,000, and have provided an estimated bill of costs in exh. "SSS6" of their affidavit in support (encl. 154) to justify this amount.

[64] In determining the appropriate quantum, I take guidance from authorities such as *Customer Loyalty Solutions Sdn Bhd v. Advance Information Marketing Berhad & Anor* [2017] CLJU 1894; [2017] 1 LNS 1894. In that case, involving a dispute over RM6,645,361.37, the court considered the application of a 25% guideline for security for costs, observing that: "[78] In the instant case, the amount in dispute is RM6,645,361.37. If the 25% guideline is to be adopted, potentially a quantum for security for cost could be as much as a maximum amount in the region of RM1.6 million. Considering the nature and degree of complexity of the claim in the underlying writ action, I do not think any of the defendants, if successful in their defence, could justify an order for costs of anywhere close to even 25% of RM1.6 million. To their credit, the defendants in the applications are praying for a much lesser aggregate amount of RM260,000." The case thus suggested that 25% of the claim amount could serve as a guideline for maximum security, though the court recognised that the actual award should be tailored to the circumstances of each case.

[65] Given that the claim exceeds RM21 million, the security sought represents only about 3.4% of this amount. However, I am mindful of the principle that security for costs should not be set at a level that would stifle genuine litigation.

[66] The plaintiff has averred in para. 26 of his affidavit in reply (encl. 165) that the security sought is excessive, unrealistic and oppressive.

[67] While I accept that this is a complex case involving multiple defendants and potentially lengthy proceedings, I also recognise that setting security too high could impede access to justice. The court must balance the interest of protecting defendants against the risk of costs going unpaid with the interest of ensuring plaintiffs with legitimate claims can pursue them.

[68] Considering all circumstances, including the complexity of the case, the number of defendants, the likely duration of trial, the need for expert evidence, the magnitude of the claim, and the principle that security should not stifle litigation, I find that a more appropriate amount of security would be RM250,000, rather than the RM720,000 sought.

On The Need For An Undertaking As To Damages

[69] The plaintiff and KKC argue in para. 11 of KKC's affidavit in reply (encl. 166) that the applications are defective because the defendants have not provided an undertaking as to damages. This argument misapprehends the law on security for costs.

[70] *In re RBS Rights Issue Litigation* involved a complex securities litigation where defendants sought security for costs totalling £11.6 million against litigation funders and where the court granted security of £7.5 million, Justice Hildyard indicated that cross-undertakings might be appropriate in some circumstances:

> Finally, I raised in the course of Mr Railton's oral opening the question whether a cross-undertaking should be required of the Defendants. This had not been raised by the funders, but in their oral submissions after the point was raised both (unsurprisingly) supported such a condition.
>
> There is plainly jurisdiction in the Court to stipulate such a condition in order to compensate the claimant in cases where no order for costs is ultimately made in favour of the applicant and against the respondent.

[71] However, this approach was explicitly rejected by the English Court of Appeal in *Rowe & Ors v. Ingenious Media Holdings Plc & Ors* [2021] 1 WLR 3189, which involved commercial litigation funders and held:

> For all these reasons, I would hold that it should only be in a rare and exceptional case that the court should require a cross undertaking in favour of a claimant as a condition of ordering security for costs, and only in even rarer and more exceptional cases that it should do so in favour of commercial litigation funders. There are no such rare and exceptional circumstances in the present case. Nor were there, so far as revealed by the reports, in *In re RBS,* [2017] 1 WLR 4635, *Bailey* [2018] 4 WLR 7, *Hotel Portfolio II* [2020] Costs LR 205 or *Pisante* [2020] EWHC 3588 (Comm), which should no longer be followed.

[72] There is nothing in the Rules of Court 2012 or Malaysian jurisprudence that requires an undertaking as to damages as a prerequisite for an application for security for costs. The non-provision of such an undertaking does not render the applications defective.

Enclosure 155 – The Fourth And Fifth Defendants' Application On The Failure To State Address In The Writ And Statement Of Claim

[73] The fourth and fifth defendants have additionally relied on O. 23 r. 1(1)(c), alleging in para. 11 of their affidavit in support (encl. 156) that the plaintiff failed to state his address in the writ and statement of claim.

[74] Upon examination of the writ, I note that the plaintiff's address is indeed stated in the endorsement as pointed out in para. 29 of the plaintiff's affidavit in reply (encl. 165): "Pengendorsan tentang peguam dan alamat. Writ ini telah dikeluarkan oleh Tetuan Vazeer Akbar Majid & Co yang

A beralamat di No. 10, Jalan 14/48, 46100 Petaling Jaya, Selangor Darul Ehsan, peguamcara bagi plaintif yang alamatnya di No. 8, Jalan Maktab 5, Off Jalan Gurney, 54000 Kuala Lumpur."

[75] Furthermore, O. 6 r. 2(e), which requires a plaintiff to state his residence and occupation, applies only if a plaintiff sues in person. As the B plaintiff in this case is represented by solicitors, this requirement does not apply.

[76] Accordingly, I find that the ground under O. 23 r. 1(1)(c) is not established.

C On Other Grounds

[77] The remaining grounds for the fourth and fifth defendants' application mirror those of the first, second, third, sixth, seventh and eighth defendants. My findings regarding the non-party status of KKC, his contribution to the plaintiff's costs in return for a share of the proceeds, and the inability to pay D costs apply equally to this application.

On The Quantum Of Security

[78] The fourth and fifth defendants have sought security in the sum of RM500,000, based on the grounds set out in para. 13 of their affidavits in E support (encl. 156).

[79] Unlike the first, second, third, sixth, seventh and eighth defendants, the fourth and fifth defendants have not provided a detailed bill of costs to justify the amount sought. This was noted by KKC in para. 8 of his affidavit in reply (encl. 166).

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[80] While I accept that a detailed bill of costs is not a strict requirement for an application for security for costs, as held in *Mas Anita Abdullah v. Lew Wai Koung* [2013] 3 CLJ 737; [2013] 8 MLJ 698, the absence of such a bill makes it more challenging to assess the reasonableness of the sum sought. In that case, the defendant had applied for security for costs of RM60,000 G against a plaintiff who had failed to pay an earlier judgment debt, had not disclosed her residential address in the writ, was frequently out of jurisdiction, and had not disclosed her financial capability to pay costs. The High Court held:

H > There is no legal requirement that the defendant gives a detailed bill of costs before he can make this application. The rules regarding the exercise of the court's discretionary powers to order security for costs are not inflexible or rigid ...

[81] Applying the same considerations as for encl. 153, and taking into account the principle that security should not stifle litigation, I find that a I more appropriate amount of security for the fourth and fifth defendants would be RM150,000, rather than the RM500,000 sought.

Conclusion And Order

[82] Having considered all the circumstances of the case, I am satisfied that it is just to order security for costs against KKC as a non-party under O. 23 r. 1(2A)(b) of the Rules of Court 2012. The evidence establishes that KKC has contributed or agreed to contribute to the plaintiff's costs in return for a share of the proceeds recoverable in this action, and there is reason to believe that costs may not be paid if ordered.

[83] While the plaintiff, as executor of the deceased's estate is suing in a representative capacity and thus not directly subject to O. 23 r. 1(1)(b), the order against KKC is warranted given his substantial involvement in and financial interest in the outcome of this litigation.

[84] With respect to the quantum, I have reduced the amounts sought by both sets of defendants to levels that I consider reasonable in light of the complexity of the case, the number of defendants, and the likely duration of trial, and the magnitude of the claim, while also ensuring that genuine litigation is not stifled.

[85] Accordingly, I allow both applications on the following terms:

(i) for encl. 153, KKC is ordered to provide security for costs in the sum of RM250,000 within ninety (90) days from the date of this order;

(ii) for encl. 155, KKC is ordered to provide security for costs in the sum of RM150,000 within ninety (90) days from the date of this order;

(iii) the security shall be paid into court or into an interest-bearing account of the applicants' solicitors;

(iv) the plaintiff's action against the respective defendants shall be stayed until compliance with this order;

(v) in the event of non-compliance, the plaintiff's claim against the respective defendants shall be struck out without further order;

(vi) costs of the applications shall be costs in the cause.